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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
2000 Biennial Regulatory Review	)
Comprehensive Review of the	)
Accounting Requirements and	)
ARMIS Reporting Requirements	)
for Incumbent Local Exchange	)
Carriers: Phase 2 and Phase 3	)
	)

CC Docket No. 00-199

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") respectfully submits these Reply Comments in the above-captioned proceeding.

NCTA supports Commission efforts to streamline regulations and reporting requirements of the entities for which it has regulatory responsibility. But the proposal advanced by USTA and supported by a number of incumbent LECs would have a negative effect on facilities-based competition. USTA states that "Part 32 does not assist in preventing the possibility of anti-competitive behavior and it does not provide information that would be useful in a complaint proceeding." USTA Comments at 5. USTA is mistaken.

Far from an "anachronism in today's competitive environment," USTA Comments at i, preservation of existing accounting data submission requirements are necessary to protect against ILEC abuse of essential bottleneck facility pricing mechanisms. These abuses can come in many forms. including unlawful cross-subsidization of non-regulated assets with regulated revenues and prohibitive pricing of bottleneck facilities, including poles, conduits and rights-of-way.[1]

[1] While NCTA focuses its comments in this submission to pole, conduit and rights-of-way

Background on Pole Rent Regulation

Specifically, all ILECs, including mid-size ILECs, are required to provide pole and conduit access to cable television operators and CLECs at just and reasonable rates. These rates are required to be based on the ILECs' booked investment and operating expenses for which current accounting requirements are critical. Eliminating or reducing the public availability of the level of accounting detail would eviscerate the FCC's highly effective regulatory regime of the critical bottleneck and pole facilities.

It is well established that cable operators are required by local franchise, environmental and zoning laws, and business realities, to make use of existing utility poles.[2] Cable operators seeking to attach facilities to those poles had been subjected to refusals, delays, overcharges, and other abuses by pole owners who feared the potential facilities-based competition.[3] Negotiation failed. State PUCs were unwilling to intervene. Antitrust litigation took over a decade. See note 8.

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pricing matters, it notes that accounting mechanisms at least as detailed as those currently required constitute an integral part of protecting against ILEC subsidization of plant used for non-regulated services and over-pricing those ILEC services and facilities that are priced on the basis of cost. The ability of regulators to perform this function would be degraded if ILECs could avoid maintaining adequately detailed records of investment, expense and depreciation. For example, how an ILEC accounts for assets used to provide digital and broadband services (including local loops) remains highly relevant to pro-competitive regulation of ILEC activities. In this regard, while cost-based regulation of ILEC retail and even wholesale rates may be less than in the past, ILEC regulatory obligations under the Telecommunications Act of 1996 require detailed cost analyses in a variety of contexts. The Commission should not eliminate accounting detail needed to properly take account of ILEC investments and expenses in meeting the cost-based pricing requirements in the statute.

[2] *See, e.g., Better TV, Inc.*, 31 F.C.C.2d 939, 956 (1971); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

[3] *See, e.g., Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong. (1977). *Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce, Parts 1 & 2*, 94th Cong. (1976); *Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce*, 94th Cong. (1976).

The Pole Attachment Act was passed in 1978 and for more than 20 years has provided the forum for the simple and expeditious adjudication of cable television access and rate disputes. The Pole Act mandates that the FCC (absent state certification over pole attachment matters) provide a readily available forum for the "simple and expeditious" resolution of pole complaints.[4] The Commission has strived since its first rulemaking to craft a rate formula that serves the overarching purposes of the Act. Simplicity, expedition, fair compensation to pole owners, and sufficient clarity to promote consistent settlements without recourse to FCC complaints for each of the hundreds of pole contracts and pole rent rate calculations reviewed annually are the hallmarks of this formula.

Use of ARMIS Data in Pole Regulation

The Commission's formula has evolved through several major rulemakings and hundreds of litigated cases that have tested and refined the intricacies of the formula adopted by rule. It has survived challenges raised in court and in Congress. It has been substantially reaffirmed in April of 2000.[5] The formula relies nearly exclusively on publicly available information, available from the ARMIS/Class A USOA annual reports routinely prepared by the pole owners. Pole proceedings have been specifically designed to be simple, expeditious three-pleading affairs to resolve disputes with a minimum of paperwork, without discovery and without live testimony.[6] A snapshot of the pole formula's application of Part 32 accounts demonstrates the importance of preserving the current level of detail in publicly reported accounting data.

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4 S. Rep. No. 95-580, at 21 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 129.

5 *Amendment of Rules and Policies Governing Pole Attachments,* 15 FCC Rcd 6453 (2000).

6 The rules authorize a complaint, a response by the party subject to the complaint, and a reply by the initial complainant. 47 C.F.R. § 1.1407. The Commission established this three-pleading system in response to Congress' direction that the FCC create a "simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paper work and procedures consistent with fair and efficient regulation."

Pole rents are determined by isolating the cost of a bare pole, which is currently booked to Class A Account 2411. USTA maintains its proposal for reliance on Class B, which would include only Account 2410, but would eliminate 2411 and Class B Account 2410. This account includes not only poles, but aerial cable, undersea cables, buried cable, intrabuilding network wiring, and conduit systems, none of which is included in the rental for attachment to a bare pole. A discrete account for pole investment would no longer be publicly available, dramatically complicating the pole and conduit rate-setting process.

Because poles are licensed for use by the pole, the pole rent is calculated by dividing the aggregate investment per bare pole by the units of poles, which in turn is maintained in continuing property records and reported in ARMIS. USTA continues to advocate the consolidation or elimination of outside plant reports containing this critical pole count data.

Pole rent carrying charges rely on the use of discrete elements of the existing matrix for expense reporting. For example, the costs of "pole maintenance" in Account 6411 is broken out in the expense matrix so that the rents that LECs pay to power companies are not charged to cable operators, who directly pay power companies for attachment to power poles. USTA's proposal to eliminate the matrix would create the very double charge that the FCC has specifically found to be unjust.[7]

Telecommunications pole rents under the formula to be phased in from 2001-2005 depend on a geographically de-averaged determination of the number of attaching parties on the pole. USTA continues to seek the elimination of the geographically distinct record keeping.

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[7] Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid & Braverman, 5 FCC Rcd 3898 (1990). *See Amendment of Rules and Policies Governing Pole Attachments,* 15 FCC Rcd 6453, ¶ 53 - ¶ 56 (2000).

Reliance on this publicly available information has allowed utility pole owners and attaching parties to resolve hundreds of rate issues on their own without Commission involvement. The typical pole attachment agreement permits the rates to be recalculated annually to reflect the most recently filed cost information. But neither the utilities nor cable operators come to the FCC annually to check those calculations. Instead, the industries have established comprehensive private review mechanisms that apply the FCC's formula to current Class A ARMIS data, as set out in public reports. This procedure would resolve almost all disputes without agency intervention. The regime has worked so well that the states which have "certified" their authority to regulate pole attachments independently have adopted the FCC formula. (Examples include – California, New York, Ohio, Massachusetts, and Michigan).[8]

The cost-saving benefits of the FCC's expeditious regime redound to the utilities, cable operators, and the Commission. The time-saving benefits are especially valuable in today's highly competitive arena, when delays in attachments by cable operators and CLECs may determine whether or not consumers have a choice among telecommunication providers.

The Continuing Need for ARMIS Data

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[8] The benefits are perhaps most vividly demonstrated in the case of small cable operators dealing with mid-sized telephone companies. Small operators are peculiarly vulnerable to pole rent overcharges, because of the lower population densities in their service areas. *Insight Communications Company*, DA 95-2334 (Nov. 13, 1995) (small system average is 35.3 homes per mile, while large system average is 68.7 homes per mile). A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers. A pole rent increase creates an enormous boost on rates, and frequently makes rural line extensions uneconomical. These same small operators are often the very parties most heavily burdened in litigating expensive document-intensive rate cases. Indeed, in one pole attachment antitrust case brought before the 1978 Pole Act, a small cable operator, Aberdeen Cable, prevailed in its Sherman Act claims against pole abuses, but by the end of the 12 years of litigation, it was bankrupt. *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256 (8th Cir. 1972); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 617 F.2d 1302 (8th Cir. 1980); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 49 R.R.2d 328, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D. 1981).

USTA states that "Part 32 does not assist in preventing the possibility of anti-competitive behavior and it does not provide information that would be useful in a complaint proceeding." USTA Comments at 5. USTA again is mistaken.

Thus, contrary to USTA's claim, Part 32 continues to be an essential tool in preventing abusive ILEC rate practices that remain critical to the Commission's pole attachment complaint processes. USTA's proposal would negate the pole attachment regulatory regime that has worked so well, essentially undoing by sleight of hand what the electric utility industry is attempting to destroy through frontal assault.[9]

The Commission has recently rebuked electric utility owners for their attempt to prevent or obscure access to the accounting data necessary to make pole-attachment rate regulation work.[10] The Federal Energy Regulatory Commission (FERC), which has principal federal regulatory responsibility for electric utilities has likewise rejected utility requests to terminate the public availability of the counterpart data on FERC Form 1.[11] USTA's proposal to condense ARMIS reporting from 191 pages to five, and its claim that "ARMIS reports have outlived their usefulness," USTA Comments at 22, are belied by the need to preserve the Commission's highly successful pole rate regulatory structure.

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9 *See, e.g., Gulf Power Co. v. United* States, 187 F.3d 1324 (11th Cir. 1999)("*Gulf Power I*"); *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000)("*Gulf Power II*"); *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 15 FCC Rcd 17346 (2000); *Alabama Power Co. v. FCC*, Docket Nos. 00-14763-II and 00-15068-II (filed Sept. 12, 2000); *Cable Telecomms. Ass'n of Georgia v. Georgia Power Co.*, 14 FCC Rcd 19373 (1999); *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, P.A. No. 00-005 (filed Nov. 14, 2000); *Cable Television Ass'n of Georgia v. Georgia Power Co.*, P.A. No. _____ (filed Jan. 17, 2001); *In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563 (2000).

10 *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 15 FCC Rcd 17346 (2000).

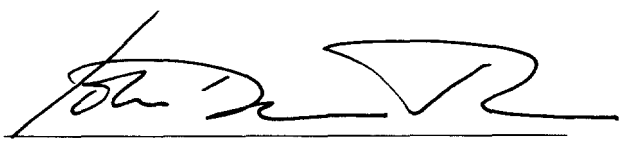
11 Letter from Douglas W. Smith, General Counsel, Federal Energy Regulatory Commission, to Gulf Power Company, FERC RIMS DOC 2090351 (Sept. 14, 2000).

The Commission should not reduce the number of entities reporting at the Class A level of detail, nor should it collapse these accounts into higher levels of aggregation. There is no regulatory or negotiating regimen on which cable television operators or CLECs may fall back should the FCC terminate the data that are the key to the FCC's pole formula. When such data is not reported publicly, in a manner that is subject to ready confirmation and which is demonstrably internally consistent, pole rent calculations rapidly fall into dispute and adversarial proceedings. Annual evidentiary hearings for each LEC reporting at a Class B level of aggregation would defeat the purposes of the Pole Act. Because poles and conduits are essential facilities, the competitive consequences would be severe.

Conclusion

For these reasons, we urge that the existing ARMIS accounts should continue to be required and publicly reported to preserve continued just regulation of pole attachment and conduit rates.

Respectfully submitted,



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